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No. 87-1613

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Appellant,

vs.

NEW HAMPSHIRE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF NEW HAMPSHIRE.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE IN SUPPORT OF APPELLANT

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**Counsel of Record*

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Official Committee of Equity Security Holders of Public Service Company of New Hampshire (the "Equity Committee") appointed on April 15, 1988, in the bankruptcy case of Public Service Company of New Hampshire ("PSNH") respectfully moves for leave to file the attached brief *amicus curiae* in support of the Appellant's Jurisdictional Statement. The consent of the attorney for the petitioner and of the State of New Hampshire has been obtained. The consent of the Consumer Advocate was requested and declined. The consent of the Campaign for Ratepayers' Rights was requested and declined.

The interest of the Equity Committee in this case arises because it represents approximately 11,000 holders of thirteen different series of PSNH preferred stock having a par value in excess of $430 million. The Equity Committee also represents approximately 45,000 common stockholders with an average holding of 800 common shares with a total par value of approximately $186 million. Both the common and some series of preferred stock are traded on national stock exchanges. PSNH has omitted dividends on its common and preferred stock since

April 1984; the amount of cumulative preferred stock dividends in arrears as of December 31, 1987 was approximately $158 million.

In the instant case, the persons most affected by the unconstitutional taking of property are the stockholders represented by the Equity Committee since it is their investment which is most likely to be adversely affected in any bankruptcy reorganization unless relief from New Hampshire Rev. Stat. Ann 378:30-a is obtained.

This case is important not only because it affects 56,000 public investors with a total investment of over $500 million, but also because it puts directly at issue the constitutionality of a form of state law that improperly impinges on the rate making process.

The Equity Committee urges the Court to note probable jurisdiction and to permit the Equity Committee to participate as *amicus curiae*.

Respectfully submitted,

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April 29, 1988

QUESTION PRESENTED

Do New Hampshire Rev. Stat. Ann. § 378:30-a and the New Hampshire Supreme Court's application thereof denying utility investors any recovery of or on investment in electric generating plant fully constructed but not yet in service, effect a taking of property in violation of the Fifth and Fourteenth Amendments when the result is (1) to prohibit the state ratemaking agency from determining whether the appropriate balance between investor and consumer interests requires such recovery and (2) to bring about the bankruptcy of the utility?

PARTIES TO THE PROCEEDING

The petitioner below was Public Service Company of New Hampshire. The State of New Hampshire was the respondent below. The Consumer Advocate, Michael W. Holmes, and the Campaign for Ratepayers' Rights were intervenors in the New Hampshire Supreme Court.

Rule 28.1 Listing

Amicus, the Committee of Equity Security Holders of Public Service Company of New Hampshire (the "Equity Committee"), is an official committee appointed in the Chapter 11 bankruptcy case of Public Service Company of New Hampshire pursuant to 11 U.S.C. §1102(a)(1). The Equity Committee has no parent companies, subsidiaries or affiliates. The members and *ex officio* members of the Equity Committee are:

The Mutual Benefit Life Insurance Company
Monarch Life Insurance Company
Donald G. Smith of Donald Smith & Co.
Richard L. Greenberg of Donald Smith & Co.
Certified Reporting Co. by James K. Arthur
Milton F. Lewis
Patrick Mainolfi
Daniel W. B. Tarbell
Mutual Service Life Insurance Co.
The Prudential Insurance Company
of America (*ex officio* member)

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INTEREST OF THE EQUITY COMMITTEE AS AMICUS

The Official Committee of Equity Security Holders of Public Service Company of New Hampshire (the "Equity Committee") was appointed on April 15, 1988 pursuant to Section 1102 of the Bankruptcy Code. The Equity Committee represents both common and preferred stockholders of Public Service Company of New Hampshire ("PSNH").

The equity investors whose interests have been adversely affected by the judgment appealed from are located throughout the United States. Most of the investors are small common stockholders with an average shareholding of only 800 shares. In total, approximately 45,000 common stockholders hold

common stock with a total approximate par value of $186 million as of December 31, 1987, and a significantly lower market value as a result of the PSNH bankruptcy. Holders of preferred stock of PSNH, $25 par value, are also small holders, with the vast majority of the preferred stock held in accounts of less than 500 shares. In total there are approximately 11,000 holders of thirteen series of preferred stock with a total par value of more than $430 million. Many of the preferred series were issued before May 7, 1979, the effective date of New Hampshire Rev. Stat. Ann. 378:30-a.

Common and preferred stockholders have not received a return on their investment since April 1984, when PSNH stopped paying dividends. Cumulative preferred stock dividends in arrears as of December 31, 1987, were approximately $158 million. More importantly, the filing by PSNH of a petition for reorganization under Chapter 11 of the Bankruptcy Code now threatens to wipe out equity investors totally, not merely eliminate a return on the PSNH investment in the Seabrook Nuclear Generating Station ("Seabrook").

STATEMENT OF THE CASE

The Equity Committee adopts the Statement of the Case by PSNH.

ARGUMENT

I. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT IMPERMISSIBLY ELEVATES AN INFLEXIBLE FORMULA OVER THE END RESULT TEST.

The New Hampshire Supreme Court has permitted the elevation of an inflexible legislative ratemaking formula without regard to the end result and whether the consequences are just and reasonable.

> It is axiomatic that the end result of Commission rate orders must be "just and reasonable" to both consumers and investors, and that, in achieving this balance, the Commission must consider the impact of its rate orders on the financial integrity of the utility.

Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1172 (D.C. Cir. 1987) (en banc).

In *Jersey Central* the allegations that the utility had not paid dividends on its common stock for four years and had no access to long term capital markets were sufficient to suggest that the regulatory commissions' actions were improper under the end result test of *FPC V. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"). The allegations were sufficient to require a hearing on the adequacy of allowed rates. Here, PSNH has not paid dividends on common and preferred stock for over four years. In addition, the New Hampshire Public Utilities Commission ("PUC") found that PSNH's financial integrity was in danger. Nevertheless, the PUC concluded it could not engage in the balancing required by *Hope*.

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court held that the rate order could not be affirmed simply because each of the component decisions, taken in isolation, was permissible. Here, the New Hampshire Supreme Court has held that the theoretical correctness or legality of a single dominant component of the ratemaking methodology (*i.e.* that since

Seabrook is not in service PSNH's investment in Seabrook cannot be considered in setting rates) precludes balancing other interests and renders the reasonableness of the "end result" irrelevant. However, this approach has been consistently rejected:

> Moreover, an order cannot be justified simply by a showing that each of the choices underlying it was reasonable; those choices must still add up to a reasonable result.

Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1178 (D.C. Cir. 1987) (en banc).

This case is of public importance because it draws into issue whether it is ever appropriate for a state to prohibit recovery on or of a prudently made investment solely because the facility is not in service, without regard to the reasons why the facility is not in service. Intuitively, the reason a facility is not in service is important and should be considered in any balancing of the interests of ratepayers and equity investors. It should make a difference whether the facility is not in service because lax management resulted in it being poorly constructed or because of changing political winds or other circumstances outside management's control. The New Hampshire anti-CWIP statute should be held unconstitutional as a statement that state legislatures cannot circumvent the *Hope* balancing test by predetermining what goes into the balance.

The judgment appealed from has undermined the fundamental concept that ratemaking is the product of expert judgment, since the New Hampshire anti-CWIP statute has removed all discretion from the PUC to exercise its expert judgment and balance the interests of ratepayers and investors.

The bankruptcy of PSNH mandates that a PUC hearing be held without the restrictions of RSA 378:30-a at which hearing the PUC can undertake a reasoned balancing of ratepayer and investor interests.

II. THE DECISION APPEALED FROM THREATENS TO DESTROY THE INVESTORS INTEREST IN PSNH, NOT MERELY TO DENY INVESTORS A RETURN ON THE INVESTMENT IN SEABROOK.

PSNH is now a debtor in bankruptcy. As its reorganization case progresses, it will be valued for different purposes, including a judicial determination as to what interest may be retained by its equity investors under a plan of reorganization. Since an issue in valuation for reorganization purposes may be how much PSNH can earn, by excluding the possibility of any future income relating to the PSNH investment in Seabrook unless it is in service, the decision of the New Hampshire Supreme Court threatens to potentially wipe out equity investors, not merely reduce their return. The anti-CWIP law holds out hope that when Seabrook goes into service then equity investors can receive their enhanced return for bearing all the risk. However, in bankruptcy time limits imposed on proposing and confirming a reorganization plan may force the valuation of the equity investors' interest in PSNH before Seabrook goes into service. Without any current return on or of the PSNH investment in Seabrook the value of equity interests (and their participation in a reorganized PSNH) may be unfairly reduced, resulting in an unjust taking of the property of equity investors.

In his dissent in *Hope*, Justice Frankfurter said that the challenged rate orders must be founded on due consideration of all elements of the public interest, that the "public interest" included more than contemporary investors and contemporary consumers and that "social as well as economic costs must be counted." 320 U.S. at 627. In this case, the social and economic costs to equity investors caused by PSNH's bankruptcy are enormous and can only be addressed and balanced by an appropriate hearing before the PUC free of the restrictions of the anti-CWIP statute.

CONCLUSION

The social and economic costs at issue in this case are of such public importance that the Court should exercise its jurisdiction and review the judgment of the New Hampshire Supreme Court.

Respectfully submitted,

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